

ON the 10th day of February, 1994, the application of the respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge Floyd V. Palmer on January 5, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney, Eugene C. Riling, of Lawrence, Kansas. The respondent and insurance carrier appeared by and through their attorney, C. Keith Saylor, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jeff K. Cooper, of Topeka, Kansas. Also appearing for FMC Corporation was Carolyn Kennedy. There were no other appearances.

RECORD

The record consists of the documents filed of record with the Division of Workers Compensation in this docketed matter, including the transcript of preliminary hearing heard before Administrative Law Judge Floyd V. Palmer on December 13, 1993, and the exhibits attached thereto, the deposition of Bessie Bauer taken on behalf of the respondent on December 17, 1993, and the exhibits attached thereto, and the deposition of Sharon K. Newell taken on December 17, 1993, as a continuation of the preliminary hearing and the exhibits attached thereto.

ISSUES

- (1) Whether claimant's injury arose out of and in the course of her employment with FMC Corporation.
- (2) Whether the respondent violated K.S.A. 44-515 in failing to provide the medical reports of Dr. Nathan Schechter to the claimant within 15 days of the claimant's request and if so should this violation exclude Dr. Schechter's reports from consideration as evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds:

- (1) Claimant met with personal injury by accident arising out of and in the course of her employment with respondent and is entitled to appropriate medical care for the treatment of this accidental injury.

Claimant is employed as a lab technician with the respondent with the physical requirements of her job well-depicted in a video tape provided by the respondent and from the deposition testimony of the claimant and Bessie Bauer.

Claimant alleges she suffered accidental injury from January 1992 through and including June 1, 1993 with injuries to her elbows, left hip, knees, left shoulder, left hand, right hand, left ankle and right hip.

Claimant earlier suffered injuries to her left upper extremities, left shoulder, left arm, low back and lower extremities while employed in the respondent's warehouse. Claimant and respondent settled those prior claims in 1991.

The respondent alleges claimant's injuries did not arise out of and in the course of her employment as her employment was not sufficiently demanding to have caused the complaints exhibited. The respondent further alleges that the injuries suffered by claimant are merely a continuation of her prior problems and not compensable due to the prior

settlement.

Claimant was examined by Dr. Joseph L. Shaw who opined that claimant had suffered a recent work related repetitive stress-type syndrome injury and was in need of medical treatment. Respondent provided the medical records of Dr. Nathan Schechter who indicated that claimant was not in need of orthopedic treatment but did suffer symptoms of lateral epicondylitis of the left elbow and possible trochanteric bursitis to the left hip and to a lesser degree to the right hip. Dr. Schechter opined that claimant's symptoms involved marked functional overlay, and were highly exaggerated. Dr. Schechter, while being critical of claimant's symptoms did not, in his reports, contradict the opinion of Dr. Shaw that claimant's condition was related to her employment with the respondent.

Whether an accident arises out of and in the course of a workers employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

The medical report of Dr. Shaw shows claimant's condition arose out of and in the course of her employment. While the video tape provided by the respondent does indicate claimant's physical duties were not of a stressful nature, there is uncontradicted credible medical evidence in the record showing a connection between the work and the claimant's alleged injuries.

Uncontradicted evidence which is not improbable or unreasonable can not be disregarded unless shown to be untrustworthy and is ordinarily regarded as conclusive. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The medical evidence of Dr. Shaw combined with the testimony of the claimant are sufficient to convince the Appeals Board that, for preliminary hearing purposes, claimant did suffer an injury arising out of and in the course of her employment and as such she is entitled to medical care for said injury.

(2) The medical records of Dr. Nathan Schechter were provided to the claimant in a timely fashion pursuant to K.S.A. 44-515. As such the medical records will not be excluded from evidence.

Claimant objects to the admissibility of the medical records of Dr. Nathan Schechter alleging respondent is in violation of K.S.A. 44-515. Claimant alleges her first request to the respondent caused Dr. Schechter's report of June 14, 1993 to be provided more than 15 days after the date of said request. A review of the evidence shows that the claimant's request marked as Claimant's Preliminary Hearing Exhibit No. 7 was not a request but was instead a release of medical records dated June 18, 1993. This release of medical records would not satisfy the requirement of K.S.A. 44-515 that a "request" be made. It should also

be noted the medical records of Dr. Schechter were provided on the 16th day following the providing of the medical release. The Appeals Board, in construing the Kansas Workers Compensation Act, believes that this would satisfy the specific intent of K.S.A. 44-515 in allowing a prompt and efficient exchange of medical reports between the parties. The medical report of June 14, 1993 of Dr. Nathan Schechter will not be excluded from evidence.

Claimant provided to the respondent a second letter dated July 26, 1993 requesting copies of the July 21, 1993 report of Dr. Nathan Schechter. This letter, while being a specific request under K.S.A. 44-515, resulted in the providing of the medical report of Dr. Schechter at a time uncertain. Claimant's counsel admitted the report was provided some time between July and October 1993, but the exact date of receipt was never specified. Without some indication as to the date of the providing of this medical report the Appeals Board cannot determine whether the respondent violated the intent of the law in failing to timely provide same to the claimant. As such the claimant's request to exclude the July 21, 1993 medical report of Dr. Nathan Schechter from evidence is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated December 13, 1993, shall be and is affirmed in all respects and shall remain in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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